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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 772.

HORACE LEE BARTINDALE,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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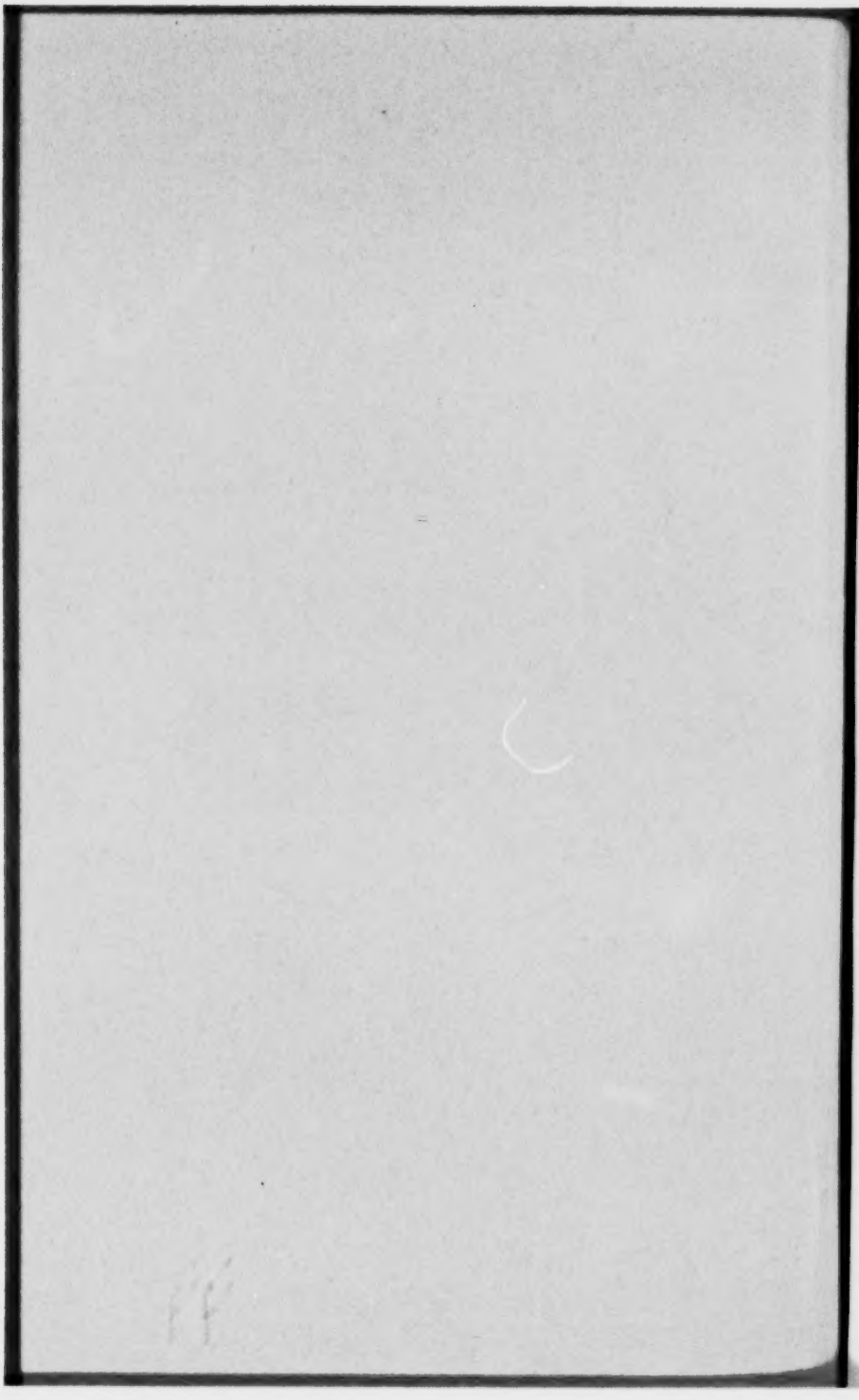

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Statement.

This is an application by Horace Lee Bartindale for a writ of certiorari for the purpose of reviewing his conviction of the crime of sodomy on his plea of guilty, entered after the commencement of his trial on the 2nd day of October, 1939, in the County Court of Rockland County, of the State of New York, and on which plea of guilty to the crime of sodomy the petitioner was sentenced by Hon. John A. McKenna, County Judge of Rockland County, to an indeterminate term of not less than five years nor more than ten years in State's Prison; and also to review an order of the County Court of Rockland County, entered on the 15th day of January, 1940, denying the petitioner's motion for an order vacating and setting aside the judgment of conviction; permitting the

withdrawal of the plea of guilty to the indictment and substituting and reinstating a plea of not guilty; and for a new trial, both said conviction and order having been unanimously affirmed on appeal to the Appellate Division of the New York Supreme Court, Second Judicial Department, on the 15th day of April, 1940, and said judgment of conviction and order having been unanimously affirmed by the Court of Appeals of the State of New York on a further appeal, by permission, to that Court on the 13th day of November, 1940, and the remittitur to the Court of Appeals was filed in the office of the Clerk of the County of Rockland on the 18th day of November, 1940.

Facts.

Horace Lee Bartindale, the petitioner, was arrested on the late afternoon of June 5th, 1939, on a charge of having committed the crime of sodomy in violation of Section 690 of the Penal Law of the State of New York, upon the person of one John Beckvermit, Jr., at the hamlet of West Nyack, in the Town of Clarkstown, in said County of Rockland, on the afternoon of said 5th day of June, 1939, and the petitioner was arraigned on said day before Justice of the Peace Frederick R. Engels, Esq., and the hearing thereon adjourned to the 19th day of June, 1939. The petitioner was held to await the action of the Grand Jury after a hearing held before said Justice of the Peace, at which hearing the petitioner was represented by his attorneys, William Pickens, Jr., Esq. and Emanuel M. Goldstein, Esq. (R. 36, 38), both of whom participated in the cross-examination of the People's witnesses and in making the appropriate motions.

The indictment (R. 5) charging the petitioner with

the commission of the crime of sodomy was returned on the 27th day of June, 1939; and the petitioner was arraigned on said indictment in the County Court on the 10th day of July, 1939, at which time he pleaded not guilty, through his counsel, Emanuel M. Goldstein (R. 9), and he again appeared in County Court on the 14th day of July, 1939 with Mr. William Pickens, Jr. as counsel (R. 9, 10), at which time the case was adjourned to the September Term of the County Court because of the illness of the District Attorney, and the petitioner continued on bail.

The actual trial of the indictment began on the 2nd day of October, 1939, with William Pickens, Jr. acting as attorney for the petitioner, and, after a jury had been impanelled and sworn, the petitioner's attorney requested a recess (R. 11, 20), during which time counsel renewed his previous efforts to persuade the District Attorney to accept a plea of guilty to a lesser crime than that charged in the indictment (R. 37, 38). When petitioner's attorney spoke with the District Attorney in regard to the acceptance of a plea of guilty to a lesser offense, the petitioner was not present, and, at no time on that day did the District Attorney speak with the petitioner (R. 36).

On the morning of October 2nd, 1939, as the Clerk of the Court was calling the names of jurors to take their seats in the jury box, and while the District Attorney was writing the names of the jurors on a pad at the counsel table, the District Attorney was approached by Mr. Pickens, the petitioner's attorney (R. 18), and asked if the District Attorney would accept a plea of assault in the third degree, which the District Attorney declined, and Mr. Pickens again approached the District Attorney at the District Attorney's counsel table and asked the District Attor-

ney if he would accept a plea to assault in the second degree, which the District Attorney declined (R. 37-41).

After the recess above mentioned was declared, and the District Attorney was walking out of the court room, Mr. Pickens approached the District Attorney and his stenographer, Mr. John M. Goetschius, and Mr. Pickens stood to one side in the hall, and Mr. Pickens stated to the District Attorney that he did not see why the District Attorney would not accept a plea of guilty to assault since his client was a first offender, and because he felt that if the case had occurred in New York City, he doubted what action, if any, would have been taken, and that if any action were taken, it would have been handled as a disorderly conduct case with a ten dollar fine in Magistrate's Court. The District Attorney replied to Mr. Pickens that he was not interested in what went on in New York City; that this was an indictment for sodomy, and that the People were ready to proceed with the trial (R. 37, 38, 41).

The petitioner's attorney then stated that he had thought the matter over, and that, after having heard the testimony before the Justice of the Peace, he felt that the petitioner would not be acquitted, and that the best thing to do would be to plead guilty because he thought it would be better for the community if the testimony was not brought out in public, and that he intended to call that matter to the Court's attention in asking for leniency for his client, and he further stated that his client had an excellent character and record (R. 38).

There was no discussion concerning the fact that the defendant was a colored person nor that a verdict of guilty was inevitable in view of notoriety given the case (R. 38).

At the conclusion of the recess, the petitioner, through his counsel, moved to withdraw a juror and withdrew his plea of not guilty and entered a plea of guilty to the indictment, after which the petitioner's statement was taken by the Clerk (R. 21). The petitioner himself consented in open court to the action taken by his attorney (R. 12).

After one John Beekvermit, Jr., the defendant in a companion indictment charging him with the crime of sodomy committed at the same time as the offense for which the petitioner was indicted, had pleaded guilty, the petitioner and said Beekvermit were remanded to the custody of the Sheriff of the County, and the date of sentence fixed as the 9th day of October, 1939, which date was advanced to the 4th day of October, 1939 at the request of both counsel and the petitioner (R. 23).

On the 4th day of October, 1939, after the petitioner had advised the Court that he had no legal cause to show why judgment should not be pronounced against him (R. 12), and his counsel had addressed the Court in his behalf (Appendix, Respondent's Brief, p. 24), the petitioner was sentenced to the New York State Prison at Ossining, New York, as a first offender, for an indeterminate sentence of a minimum of not less than five years and a maximum of not more than ten years (R. 13), at which time Judge McKenna addressed the petitioner (Respondent's Brief, Appendix, pp. 24, 25), and the petitioner immediately entered upon the service of his term of imprisonment as imposed by the County Court.

Thereafter the petitioner retained Irving I. Erdheim, Esq., as his attorney, and through his new counsel made a motion on the 6th day of November, 1939, returnable before the County Court of Rock-

land County on the 8th day of December, 1939, for an order vacating and setting aside the judgment of conviction; permitting the withdrawal of the plea of guilty to the indictment and substituting and reinstating a plea of not guilty; and for a new trial (R. 25). Only the affidavit (R. 26-35) of the petitioner, based solely on hearsay, was submitted in support of this application, and, at no time, was there any affidavit of his former attorney, Mr. William Pickens, Jr., presented to the Court. In opposition to the petitioner's motion the People submitted the affidavits of the District Attorney (R. 36-40) and of the District Attorney's stenographer (R. 41), who was present at the time the alleged conversations with the petitioner's former attorney occurred. This motion was denied after argument (R. 14, 24), and an order to that effect duly entered in the office of the Clerk of the County of Rockland on the 15th day of January, 1940 (R. 7, 8).

Subsequently and on the 19th day of January, 1940, the petitioner made a motion in the County Court of Rockland County for a modification of the sentence imposed upon him on the 4th day of October, 1939, which motion was denied with leave to renew and without prejudice (R. 15). No appeal was taken from the order denying this motion.

A second motion was made in the petitioner's behalf for a modification of the sentence imposed upon him in the County Court of Rockland County, on the 29th day of January, 1940, which motion was denied (R. 16), and no appeal was taken from the order denying that motion.

POINT I.

No Federal constitutional question was raised in any of the courts of New York State.

The petitioner relies upon that part of his affidavit submitted in support of his motion to withdraw his plea of guilty and substitute and reinstate a plea of not guilty and for a new trial, which is contained in the record herein at folios 101-103 inclusive at pages 34 and 35, but, however, a careful examination of his affidavit will show that he was referring to the constitution of the State of New York, because he specifically refers to "the constitution of this State", meaning the Constitution of the State of New York. At no time in either the County Court of the County of Rockland nor on his appeals to the Appellate Division of the New York Supreme Court, Second Judicial Department or to the New York State Court of Appeals did the petitioner or counsel on his behalf, either by way of argument or in the briefs, raise any federal question or refer to the Constitution of the United States; and the petitioner's present contentions under the Federal Constitution were not urged until after the judgment of conviction and order of the Rockland County Court were unanimously affirmed by the Court of Appeals.

Thus an examination of the record shows that there is really no Federal question involved in this case, and the points now set forth purporting to raise questions under the Constitution of the United States are frivolous and in no aspect do they involve issues under the Federal Constitution.

Kelly v. *Oregon*, 273 U. S. 589.

POINT II.

The petitioner was not deprived of a trial on the merits in contravention of the Fourteenth Amendment to the Constitution of the United States, and his plea of guilty was not brought about by any fraud, deceit or trickery.

Not only was there no trickery or deceit practiced upon this petitioner, but there was no need of any such conduct because the prosecution had a strong case and was ready to proceed to trial. On the morning that trial began, as soon as both counsel took their seats in the court room, petitioner's trial counsel approached the District Attorney (R. 18) with an offer to plead guilty to the crime of Assault in the Third Degree, and shortly thereafter with an offer to plead guilty to the crime of Assault in the Second Degree, both of which offers were declined (R. 37). After the jury had been examined and sworn, a recess was declared at the request of the petitioner's counsel, Mr. Pickens (R. 11, 20), and Mr. Pickens again talked with the District Attorney and endeavored to obtain the prosecution's consent to the acceptance of a plea to a lesser offense. When his efforts in this regard failed, he stated that he thought that the best thing to do would be to plead guilty because, as he had been present and had heard the testimony taken before the Justice of the Peace at the time that the petitioner was held to await the action of the Grand Jury, he felt that the petitioner would not be acquitted.

If the evidence to support the indictment had been weak, or the prosecution had, for any reason, been anxious to obtain a plea of guilty, the District Attorney certainly would have accepted one of the offers

to plead guilty to Assault, particularly so when an offer was made to plead guilty to a felony, namely, Assault in the Second Degree.

Both in his affidavit submitted on the motion (R. 27) and in his brief the petitioner endeavors to create the impression that the attorney who represented him at the trial and at the time of the entry of the plea and sentence did not participate in the case until some time after he was arraigned on the indictment, when, as a matter of fact, that attorney, Mr. William Pickens, Jr., had not only represented him at the time of the indictment (R. 10) but had appeared and represented him at the hearing before the magistrate on the 19th day of June, 1939 (R. 36). On that occasion Mr. Pickens heard the testimony of the People's witnesses and read and examined the petitioner's signed statement, which was offered and received in evidence at that hearing. This statement had been taken at the time of the petitioner's arrest and contained his admission as to his participation in the offense charged.

After the petitioner on the 2nd day of October, 1939 had withdrawn his plea of not guilty and had pleaded guilty to the indictment (R. 12, 21), the Court denied the request of the petitioner's attorney that he be continued on bail pending sentence (R. 12, 22), even though he had been free on bail since shortly after he was held to await the action of the Grand Jury. As shown by the record (R. 22), the application to continue the petitioner on bail and the Court's denial thereof was as follows:

> "Mr. Pickens: If your Honor please, will your Honor continue bail of the Defendant Bartindale?
>
> The Court: I deny that motion after a plea of guilty. There is no bail to continue.

> Mr. Pickens: Even if the District Attorney consents to it?
>
> The Court: I don't care if the District Attorney consents to it or not. After a plea of guilty it is not the practice of the Court to continue defendants on bail."

The language used by the Presiding Judge in advising the petitioner's attorney that the Court did not care whether or not the District Attorney consented to his application to continue the petitioner on bail pending sentence certainly was notice to both the petitioner and his counsel that the District Attorney was in no position to and could not make any representations or promises to either or both of them as to what action the Court might take in this criminal proceeding. Surely when Judge McKenna had advised them in open court that the Court would not be influenced by any consent or recommendation of the District Attorney on the question of continuing the petitioner on bail pending his sentence, they could not believe or expect that the District Attorney could or would be able to influence the Court by recommendation or otherwise when it came to the matter of sentence.

In as much as the transcript of the proceedings at the time of the sentence on October 4, 1939 is not contained in the record submitted on this application for a Writ of Certiorari, and in as much as the Court's remarks and the remarks of the petitioner's attorney to the Court prior to sentence on that occasion refute the petitioner's present position that he was tricked or deceived, the stenographer's transcript of the proceedings immediately prior to and at the time of sentence are submitted with the respondent's brief as an Appendix.

On the 4th day of October, 1939 before actually pronouncing sentence, the Presiding Judge of the County Court addressed the petitioner (Respondent's Brief, Appendix, pp. 24-25), and both the petitioner and his attorney could readily infer and understand from Judge McKenna's remarks that he intended to impose a prison term as punishment for the offense committed by the petitioner. At that time neither the petitioner nor his attorney, either before or after the actual pronouncing of the sentence, said anything in regard to or made any complaint to the Court concerning any alleged representation or promise that the petitioner would receive a suspended sentence, but on the other hand counsel pleaded with the court to suspend the execution of the sentence about to be imposed. Certainly if such a promise or representation had been made, it would have been immediately called to the attention of Judge McKenna after a sentence of from five to ten years had been imposed.

All of the circumstances which surround the proceedings in the County Court of Rockland County on both the 2nd and 4th days of October, 1939 show clearly that no such representation or promise was made as claimed by this petitioner. It is respectfully submitted that if a defendant who feels dissatisfied with the sentence imposed on his plea of guilty, may change attorneys and then obtain a withdrawal of his plea of guilty and a new trial on his uncorroborated hearsay statements that he had been tricked and deceived by representations and promises as to the sentence to be imposed, that there would be no end to a criminal proceeding where a plea of guilty had been entered.

When the New York State Court of Appeals in the case of *People* v. *Daiboch*, 265 N. Y. 125, at page 131,

said that when it appears a man was tricked or deceived into pleading guilty, the courts may be able to find some remedy, that Court undoubtedly meant that there would have to be proof of such trickery or deceit. This petitioner bases his claim solely on his own uncorroborated hearsay statements, and it is the respondent's contention that the Court in the case of *People* v. *Daiboch*, *supra*, did not mean that any such remedy might be found in a case where the claim of trickery or deceit was based on any such hearsay statement.

An examination of the authorities from other jurisdictions, relied upon by the petitioner, show that in the Courts of those other States, before any such plea of guilty would be vacated, the petitioner would be required to submit a properly supported motion, and it would be necessary for the Court to find proper and sufficient legal proof that the plea of guilty had not been voluntarily and intelligently made or had been obtained through duress, fraud, trickery, or deceit, and there is no such legal and sufficient proof of any such fact in this case.

The petitioner further contends that even if no promises or representations were made by the District Attorney to his counsel, he should be permitted to withdraw his plea of guilty because of trickery and deceit practiced upon him by his own attorney. If a defendant after he had been sentenced on his plea of guilty may obtain a withdrawal of his plea and a new trial merely by obtaining a new attorney and then setting up the claim that he was not properly advised and was deceived by his former attorney, a situation would arise where it would be safer and to the best advantage of the community to make every defendant stand trial regardless of whether or not he desired to plead guilty to the charge in the

indictment. It would seriously interfere with the orderly procedure of our penal statutes were the courts to grant new trials on the pretext of a defendant's alleged injudicious selection of counsel or on the defendant's unsupported statement that he had been tricked or deceived by his former attorney.

The petitioner, having been, at all times, represented by counsel and in a position to call any witnesses he desired to have heard in his behalf, was not deprived of his liberty without due process of law because there is no showing that he had not full opportunity to consult with counsel, or that he was in any way prevented from securing needed witnesses, and his petition for a Writ of Certiorari is wholly without merit.

Kelly v. *Oregon*, 273 U. S. 589.

This case is clearly distinguishable from the cases of *Brown* v. *Mississippi*, 297 U. S. 278, and *Powell* v. *Alabama*, 287 U. S. 45, cited by petitioner, because in those cases the question of due process of law involved the questions of brutality and lack of counsel, neither of which situation existed herein.

POINT III.

All of the proceedings, from the time of the petitioner's arrest to the affirmance by the Court of Appeals, were in conformity with the laws and procedure adopted by the State of New York.

The petitioner was arrested on the 5th day of June, 1939, in the Town of Clarkstown, in the County of Rockland and State of New York, on a warrant charging him with the commission of the crime of

sodomy and was arraigned before a magistrate who informed him of the charge against him and of his right to the aid of counsel, and, at the petitioner's request, the proceedings were adjourned until the 19th day of June so that the petitioner might engage counsel. These proceedings were in conformity with the provisions of Section 188 of the New York Code of Criminal Procedure, which is as follows:

> "Sect. 188. *Magistrate to inform defendant of the charge, and his right to counsel.*
>
> When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

Thereafter, on the 19th day of June, 1939, the hearing was held before the magistrate, at which time the petitioner was represented by William Pickens, Jr. and Emanuel M. Goldstein, Esquires, as his attorneys and counsel. At this hearing witnesses were called and examined on behalf of the People, and these witnesses were cross examined by the attorneys for the petitioner, and a statement of the petitioner admitting his part in the commission of the sodomy was offered and received in evidence; and, after the defendant, through counsel, had waived further examination, he was held to await the action of the grand jury in conformity with the provisions of Section 208 of the New York Code of Criminal Procedure, which is as follows:

> "Sect. 208. *When and how to be committed.*
>
> If, however, it appears from the examination

that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement, an order, signed by him, to the following effect: 'It appearing to me by the within deposition (and statement, if any) that the crime therein mentioned (or any other crime according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same.' "

Thereafter the petitioner was duly indicted and arraigned and brought on for trial in the County Court of Rockland County as heretofore mentioned.

It is to be noted that petitioner's attorney William Pickens, Jr., who represented him when he pleaded guilty to the charge, had been one of his attorneys and counsel from the time of the hearing prior to his being held to answer to the grand jury up to and including sentencing under his plea of guilty.

Following his sentence in the County Court, the petitioner was delivered to the Warden of the New York State prison designated by the Court and entered upon the execution of his sentence.

Thereafter the petitioner engaged other counsel and made a motion before the County Court under Section 337 of the Code of Criminal Procedure to vacate and set aside the judgment of conviction, and to permit the withdrawal of the plea of guilty to the indictment and substitute and reinstate a plea of not guilty, and for a new trial. This motion was made solely on the affidavit of the petitioner, and he concedes that he had no personal knowledge of the matters set forth

therein but relied upon what was told to him by his attorney William Pickens, Jr. No affidavit or proof of any kind by attorney Pickens was submitted or offered to the Court. In a motion of this kind the practice is to present the same to the Court upon affidavits and argument. The petitioner's appearance before the Court to testify would have been of no assistance to the Court in deciding the motion since the petitioner's own moving affidavit showed he had no knowledge of the allegations therein contained but was relying upon hearsay. However, if the petitioner or his then counsel had desired to have him before the Court to testify, he should have, prior thereto, obtained an order from the Court to that effect pursuant to the provisions of Section 415 of the Civil Practice Act of the State of New York, which is as follows:

> "Sect. 415. *Order to bring up prisoner as witness.*
>
> A court of record, other than a justices' court of a city, or a judge of such a court, or a justice of the supreme court has power, upon the application of a party to an action or special proceeding pending therein, to make an order for the purpose of bringing before the court, a prisoner, detained in a jail or prison within the state, to testify as a witness in the action or special proceeding, in behalf of the applicant."

But the petitioner's attorney at no time requested the Court for an opportunity to have the petitioner or any other witness in court (R. 70), but only offered to do so if the Court desired his presence (R. 70), so that it affirmatively appears from the record that the petitioner was not denied a hearing and that coun-

sel for the petitioner at no time requested an opportunity be granted him to produce the petitioner so that the Court might hear testimony, as claimed by him in his petition and brief. The motion was opposed by the respondent, and, after argument and fully hearing both sides, the motion was denied by the Court. Section 337 of the Code of Criminal Procedure of the State of New York provides as follows:

> "Sect. 337. *Plea may be withdrawn by permission of the court.*
>
> The court may in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted."

It has been repeatedly held by the Courts of New York State, in interpreting Section 337 of the Code of Criminal Procedure, that the Court was without jurisdiction to permit a defendant to withdraw his plea of guilty and substitute therefore a plea of not guilty after judgment had been pronounced on the plea of guilty and the defendant's term of imprisonment had commenced.

> *People* v. *Daibock*, 265 N. Y. 125;
> *Matter of Dood* v. *Martin*, 248 N. Y. 394;
> *People* v. *Wroldsen*, 228 N. Y. App. Div. 838;
> *People* v. *Vitale*, 211 N. Y. App. Div. 814.

The petitioner contends that this interpretation of Section 337 of the Code of Criminal Procedure is not a general one, but that where a defendant had been tricked or deceived into pleading guilty, the courts should be able to find some remedy. There was no trickery or deceit practiced on this petitioner and

the respondent submits that the petitioner's claims in that regard are entirely hearsay and, according to his own statement, he has no direct knowledge of the allegations contained in his affidavit, and he has not submitted any affidavit, or proof of any nature, of his former attorney by whom he claims these statements were made to him.

Even assuming that the County Court of Rockland County had the power or jurisdiction to grant petitioner's motion to set aside the plea of guilty and reinstate the plea of not guilty after the beginning of the term of imprisonment—although the respondent contends that the Court had no such power or jurisdiction—it would still have been a matter within the discretion of the Court according to the provisions of Section 337 of the Code of Criminal Procedure, and the Court would have been acting with proper discretion in denying the petitioner's application. As all the proceedings had taken place in the County Court, that Court's denial of the petitioner's motion would not have been an abuse of discretion particularly since the claim that the petitioner was tricked and deceived into entering a plea of guilty was based solely on the petitioner's own hearsay statements.

The petitioner then appealed both his judgment of conviction and the order denying him the right to withdraw his plea of guilty and reinstating the plea of not guilty, and these appeals were heard by the Appellate Division of the New York State Supreme Court, Second Judicial Department, and by the Court of Appeals, the court of last resort in the State of New York, and both the judgment of conviction and the order denying his request to withdraw his plea of guilty were unanimously affirmed, without opinion, in both courts.

POINT IV.

Petitioner was not deprived of life and liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

All of the proceedings in the prosecution of this criminal charge were conducted in conformity with the laws and procedure adopted by the State of New York, and it has been repeatedly held by this Court that due process of law does not require a State to adopt any particular form of procedure in criminal trials, so long as the accused had sufficient notice of the accusation and adequate opportunity to defend.

Snyder v. *Massachusetts*, 291 U. S. 97;
Frank v. *Mangum*, 237 U. S. 309;
Garland v. *Washington*, 232 U. S. 642;
Rogers v. *Peck*, 199 U. S. 425.

At the arraignment and hearing before the Magistrate before indictment and at the arraignments in the County Court after indictment, sufficient notice of the accusation was given to the petitioner. The petitioner had adequate opportunity to defend himself, both at the magistrate's court hearing at which he was represented by two attorneys, and later after indictment, because long prior to his indictment he was released from custody on bail and continued so until the day he entered his plea of guilty to the charge after the jury had been selected and sworn and the trial was ready to proceed.

As pointed out before, no request was made in behalf of the petitioner nor was any attempt made to produce him before the court upon the hearing of the motion to withdraw his plea of guilty and to

substitute a plea of not guilty; and his presence was not necessary or required. And it is a well known fact that many motions before trial and after trial are heard in the defendant's absence as are the prosecutions of appeals. There was no need for the presence of the defendant either as an aid to the court or himself because the matter concerning which he would have been called upon to testify was purely hearsay, according to his own application, and it was not an instance where he was to be or should have been confronted with witnesses against him.

Snyder v. *Massachusetts*, 291 U. S. 97, 107.

This petitioner, as a defendant on a criminal charge, received fair and impartial treatment and was prosecuted on the charge against him in conformity with the laws and regulations expressed by the sense of justice of the People of the State of New York, and in determining whether one convicted of crime has been denied due process of law guaranteed to him by the Fourteenth Amendment of the United States Constitution, the entire course of proceedings and not merely a single step must be considered.

Frank v. *Mangum*, 237 U. S. 309, 331.

Merely because the procedure adopted by the State of New York for the prosecution of a criminal charge of this nature, and which procedure, together with all the rights and privileges guaranteed to him, was followed in the prosecution of the original charge and the subsequent indictment against the defendant, does not meet with the petitioner's approval, and he may differ as to the fairness or policy of the People

of the State, is not a valid reason for changing or nullifying the established practice and procedure of the State. If that were so then the criminal law would be brought into contempt and every expression by the defendant that he believed that he had been unjustly dealt with would be sufficient to nullify a sentence pronounced by a court of competent jurisdiction in obedience with the court's own State law and thereby set the guilty free.

CONCLUSION.

The application of the petitioner for a writ of certiorari for a review of the final judgment of the Court of Appeals of the State of New York, which affirmed the judgment of conviction and order of the County Court of the County of Rockland, should be denied.

Respectfully submitted,

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